IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 160 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME TAX

Versus

PARSHOTTAMDAS K PANCHAL

Appearance:

MR AKIL KURESHI for M/s. MANISH R BHATT & Co.
for Petitioner
SERVED BY RPAD - (N) for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE M.S.SHAH

Date of decision: 23/01/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

At the instance of Commissioner of Income-tax, Gujarat-IV, Ahmedabad, the Income Tax Appellate Tribunal, Ahmedabad Bench 'A' has referred following question of law for the opinion of this Court under section 256(2) of the Income-tax Act, 1961, in respect of Assessment Year 1979-80 :

"Whether, on the facts and circumstances of the case, the share income from M/s. Karshandas Bechardas & Sons was rightly deleted from the total income of the assessee who was assessed in the status of an individual?"

2. FACTS :

The respondent - assessee is an individual. He was a member of an H.U.F. known as 'Kantilal Karshandas' which was a partner in the firm of M/s Karshandas Bechardas & Sons through its Karta. A partial partition had taken place in the family in the year relevant to the Assessment Year 1970-71 by which the amount standing in the name of the HUF in the books of M/s. Karshandas Bechardas & Sons was partitioned amongst the members of the family. At the time of the partition, the assessee was a minor and, therefore, his share of income from the said firm was included in the hands of his father as per the provisions of section 64 of the Income-tax Act, 1961 ("the Act" for short). After he attained the majority, his share of income from the said firm was assessed in the capacity of "individual". In the previous year, relevant to Assessment Year 1979-80, the assessee got married. In his returns of income filed in the status of 'individual', the assessee did not show his share of profits from the said firm, as he took-up a stand that since he had received his share on the partition of the family and since after his marriage, his smaller HUF came into being, share of profit in the said firm belonged to his smaller HUF and not to him in his individual capacity. The Income-tax Officer, however, took the view that since the assessee was minor at the time of partition, the partition was not valid in law. For this purpose, the I.T.O. relied on the order of the Tribunal in the case of Apoorva Shantilal, which was confirmed by the Gujarat High Court in Apoorva Shantilal v. CIT, (1982) 135 ITR 158. In view of the above referred to conclusion, the I.T.O. clubbed the share of profit from the firm of M/s. Karshandas Bechardas & Sons in the total income of the assessee in his individual capacity.

3. In appeal before A.A.C., the assessee pointed out

that the decision of the Gujarat High Court was reversed by the Supreme Court in Apoorva Shantilal v. Commissioner of Income-tax, Gujarat-I, (1983) 148 ITR 558 by holding that the partition effected by the bigger HUF was valid and submitted that his share in the income from the said firm should be treated as belonging to his smaller HUF. The AAC accepted the assessee's contention that the partition effected by the bigger HUF was the valid partition. However, since the assessee's smaller HUF consisted of husband and wife only, the AAC held that till a son is born in the smaller HUF, the share of income from the said firm belonged to the assessee in his individual capacity. The assessee thereupon approached the Tribunal by filing an appeal. Relying on the order of the Tribunal in the case of Atulkumar Ramanlal , ITA No.178/Ahd/84, decided on September 22, 1984,in which the Tribunal had an occasion to consider identical facts and circumstances, the Tribunal accepted the submission made on behalf of the assessee that his share of income from the said firm was not assessable in his individual assessment. The Tribunal directed the I.T.O. to modify the assessment made accordingly. The Commissioner of Income-tax, Gujarat-IV, Ahmedabad claimed reference from the Tribunal on the point of law which is accepted and that is how the present reference is placed before us for our opinion.

4. Mr. Akil Kureshi, learned counsel for the Revenue submitted that where on a partial partition of a HUF, the assessee is allocated his share, the status of individual governed by the Hindu Law would not automatically change to that of an HUF merely on his marriage and till a son is born in a smaller HUF, the share income from the firm will have to be treated as belonging to the assessee in his individual capacity. According to the learned counsel, the assessee was the absolute owner of the property which fell to his share as a result of partition and was competent to deal with it as he wished and till a son is born in a smaller HUF, the share income from the said firm being his individual income, the assessment of the assessee in the capacity of individual being just and legal, should have been upheld by the Tribunal. What was emphasised was that when the property was received by the assessee at partition, he was a single member and did not constitute a family and his status as individual did not get altered on his marriage and in absence of a son, as the personal law of assessee regards him as the owner of the property, the assessment in the capacity of individual ought to have been upheld by the Tribunal. In support of his submissions, the learned counsel placed reliance on the

Full Bench decision of Patna High Court in CIT v. Shanker Lal Budhia, (1987) 165 ITR 380.

5. Though served, none appears on behalf of the respondent.

OPINION :

6. We have considered the submissions made at the Bar by the learned counsel for the Revenue and the decisions of Supreme Court, this High Court as well as of different High Courts on the point. The question is whether a Hindu joint family can be formed only with a sole male member. A Hindu joint family consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters. A Hindu coparcenary is a much narrower body than the joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property; these being the sons, grand sons and great grandsons of the holder of the joint property for the time being. Therefore, there may be a joint Hindu family consisting of a single male member and widows of deceased coparceners. The plea that there must be atleast two male members to form a Hindu undivided family as a taxable entity cannot be accepted. The expression 'Hindu undivided family' in the Income-tax Act is used in the sense in which a Hindu joint family is understood under the personal law of Hindus. Under the Hindu system of law, a joint family may consist of a single male member and widows of deceased male members and apparently the Income-tax Act does not indicate that a Hindu undivided family as an assessable entity must consist of at least two male members. Property of a joint family, therefore, does not cease to belong to the family merely because the family is represented by a single coparcener, who possesses rights which an owner of property may possess. Under the Hindu system of law, a joint family may consist of a single male member and his wife and daughters and there is nothing in the scheme of the Income-tax Act to suggest that a Hindu undivided family as an assessable unit must consist of at least two male members. The Supreme Court in the case of SURJIT LAL CHHABDA v. CIT (1975) 101 ITR 776 after reviewing the earlier decisions on the point, has held as under :-

> "The joint Hindu family, with all its incidents, is thus a creature of law and cannot be created by act of parties, except to the extent to which a stranger may be affiliated to the family by adoption. But, the absence of an antecedent history of jointness between the appellant and

> his ancestors is no impediment to the appellant, his wife and unmarried daughter forming a joint Hindu family. The appellant's wife became his sapinda on her marriage with him. The daughter too, on her birth, became a sapinda and until she leaves the family by marriage, the tie of sapindaship will bind her to the family of her birth. As said by Gopalchandra Sarkar Sastri in his 'Hindu law' (Eighth edition, page 240)."Those that are called by nature to live together, continue to do so" and form a joint Hindu family. The appellant is not by contract seeking to introduce in his family strangers not bound to the family by the tie of sapindaship. The wife and unmarried daughters are members of his family. He is not by agreement making them so. And as a Hindu male, he himself can be the stock of a fresh descent so as to be able to constitute an undivided family with his wife and daughter."

Having regard to the principles laid down by the Supreme Court in the above quoted decision, we are of the opinion that the distinction pointed out by the Supreme Court is very material for deciding as to whether the absence of a second sharer within the Hindu undivided family renders what is otherwise joint family property individual property. In cases where the property held by the person who claims it to be his own, had in fact been held by a joint family earlier and is ipso facto capable of being held by other sharers as well in future if and when the family comes into existence and a son whether by birth or adoption is added thereto, such property continues to retain the character of joint family property even when the family is reduced to a single male member as in the case of a sole surviving coparcener. Though such a sole surviving coparcener may be assessable as an individual, as he cannot be said to have a family, unless there are in fact present female members in the family, the character of the property continues unaltered as joint family property though for the time being it is not shared with any other member of the family and may or may not be subject to any charge in favour of anyone else for any purpose.

In cases where a Hindu undivided family exists but does not have any ancestral property and the property is sought to be treated for the first time as belonging to the Hindu undivided family before it can be so treated as property belonging to a joint family, such a family should have at least two members capable of claiming a share in the property. If the property is held by the

person who seeks to impress it for the first time with the character of joint family property notwithstanding any declaration that he may make, that property will continue to be property which he can deal with as he likes subject only to the incidents to which similar property in the hands of any others are subject.

What is emphasised by the Court in the case of Surjit Lal Chhabada (1975) 101 ITR 776 (SC), is that two factors must coalesce: (1) there must exist a plurality of persons constituting a Hindu undivided family and (2) that the property which is to be treated as property belonging to the Hindu undivided family must be property which had been held earlier by a coparcenary in which a member of that family was one of the coparceners.

In the case of N.V.Narendranath v. CWT (1969)74 ITR 190, the Apex Court has held that the ancestral property allotted to the member whose family consisted of himself, his wife and his daughter was the property belonging to Hindu undivided family and required to be assessed as such, notwithstanding the absence of a son who alone could claim partition. In that case, the two factors referred to earlier coalesced - there existed a family and the property was ancestral. The Supreme Court disagreed with the High Court which had held that in the absence of a son who could claim a partition, the property though ancestral was only to be assessed as individual property of the assessee therein.

7. The Division Bench of this Court had an occasion to consider this question in BHARATKUMAR CHINUBHAI v. COMMISSIONER OF INCOME-TAX, GUJARAT, (1969) 71 ITR 1. In the said case, a family conisisting of father, mother, son and daughters was reduced to one male coparcener with unmarried sister on father's and mother's death. The department contended that as the assessee was the sole coparcener, the property which originally belonged to the family should be assessed to wealth-tax, as the property of the assessee as an individual and not as the property of a Hindu undivided family consisting of the assessee and his sister. The High Court on review of the case law has held that the property belonged to the Hindu undivided family and was assessable as such in the hands of the Hindu undivided family. What is ruled therein is that the property received on partition of joint family by a coparcener having a wife and daughter belongs to the Hindu undivided family and it is assessable as such in the hands of the Hindu undivided family under the Income Tax and Wealth Tax Acts. Again, this question came to be considered by Division Bench of this Court in

COMMISSIONER OF WEALTH-TAX, GUJARAT-I v. HARSHADLAL MANILAL, (1974)97 ITR 86. In that case, the father of the assessee had died leaving his widow, his only son i.e. the assessee and a daughter. The assessee had later married and they had only a daughter. What the assessee had received on the death of his father consisted entirely of self-acquired properties of his father. Before the Wealth-tax Officer, it was claimed by the assessee that he should be assessed in the status of a Hindu undivided family in regard to the net wealth which consisted entirely of the assets which he had received on the death of his father. On the relevant valuation date, the family consisted of the assessee, his wife, his daughter and his mother. The Appellate Tribunal was of the view that the value of the assets was to be assessed in the hands of the Hindu undivided family represented by the assessee. On a reference at the instance of the Commissioner, the High Court after applying the test of the rights of members of the family in existence as well as to be born, has held that the said property in the hands of the assessee was liable to be assessed as Hindu undivided family represented by assessee and not in his individual capacity.

8. In W.P.A.R.RAJAGOPALAN v. COMMISSIONER OF WEALTH-TAX, (2000) 241 ITR 344 the assessee had received a share of ancestral property at a partition. The property had the character of a joint family property. That property was held for some time by the assessee himself, as he was a bachelor between 1952 and 1960. During that period the character of the property as joint family property was not erased though it was open to him to deal with the property as he liked in that period. When the assessee got married and acquired a family, that family constituted a Hindu undivided family and the ancestral property which the assessee had received at the partition became the property of that Hindu undivided family. The assessee filed a wealth-tax return disclosing wealth of the assessee in the capacity of a specific H.U.F. The assessee filed a revised return subsequently and claimed that he should be assessed as an individual. The assessee was assessed as a specified H.U.F. In appeal, the Deputy Commissioner (Appeals) accepted the assessee's claim that he should be assessed in the status of an individual. However, on further appeal to the Tribunal, order of the I.T.O. was restored. In reference at the instance of the assessee, Madras High Court, after referring to the judgments of the Supreme Court on the point, has held that when the assessee got married and acquired a family, that family constituted a Hindu undivided family and the ancestral

property which the assessee had received at the partition, became the property of that Hindu undivided family. Further it is held that in cases where the property even at the time it vested in the hands of the head of the family, had the character of ancestral property, the absence of a son, who can claim partition, does not render what is joint family property, individual property. The test, according to the Madras High Court, is not as to whether his issues are male or female, but the test is whether the property was ancestral. Thus, after considering the principles of Hindu law, the Madras High Court has held that an individual who receives ancestral property at partition and who subsequently acquires a family, but has no male issues, would hold that property only as property of the Hindu undivided family.

9. Again, in COMMISSIONER OF INCOME-TAX v. ARUN KUMAR JHUNJHUNWALLA AND SONS, (1997) 223 ITR 45, it has been held that the expression "Hindu undivided family" in the Income-tax Act, 1961 is used in the sense in which a Hindu joint family is understood under the personal law of Hindus and in order to constitute a joint family, it is not always necessary that there should be two male coparceners. According to the principle laid down in this decision, even prior to the Hindu Succession Act, 1956, in a joint family property a wife or other female member was entitled to maintenance under the Hindu Women's Right to Property Act, 1937 and as the limited right has been converted to a full right under section 14 of the Hindu Succession Act, 1956, the assessee after his marriage could form a Hindu undivided family and be assessed in the status of a Hindu undivided family.

10. In BALKRISHNA GOYAL v. COMMISSIONER OF WEALTH-TAX, (1996) 218 ITR 671, the assessee had obtained property on partial partition which had taken place in 1955 among his grandfather, father and brothers. At that time, he was unmarried. Till the assessment year 1978-79, the returns were filed by him in the status of an individual. He got married on February 24, 1978. Thereafter he submitted his income-tax and wealth-tax returns for the assessment year 1979-80 claiming status as Hindu undivided family in respect of the properties obtained by him at a partial partition. His status as Hindu undivided family was accepted by the Tribunal for the year 1979-80. However, for the subsequent years i.e. 1980-81 to 1983-84, the Wealth-tax Officer did not accept the status as Hindu undivided family in respect of those properties and took the status as an individual which was confirmed by the Tribunal. On reference, the Madhya

Pradesh High Court placing reliance on a Full Bench decision of the Madhya Pradesh High Court in CIT v. KRISHNA KUMAR, (1983) 143 ITR 462 has held that the Tribunal was not justified in not accepting the status of the assessee as Hindu undivided family for assessment years 1980-81 to 1983-84. The Madhya Pradesh High Court has taken the view that the assessee was entitled to be assessed in the status of a Hindu undivided family, although the assessee had no son and the wife had no interest in the property of the family, because for the purposes of status, the assessee with his wife had constituted a Hindu undivided family.

11. Reliance placed by the learned counsel for the Revenue on the Full Bench decision of the Patna High Court in the case of CIT v. SHANKER LAL BUDHIA (supra) is of no avail to the Revenue. With great respect to the learned Judges who decided the case, we are unable to agree with the line of reasoning suggested therein. The Full Bench of Patna High Court had no occasion to consider the two Division Bench judgments of this Court which are referred to earlier. Moreover, the Supreme Court decision in N.V. Narendranath (supra) was also not considered by the Full Bench of Patna High Court. An individual who receives ancestral property at a partition and who subsequently acquires family, but has no male issue, would hold that property only as the property of Hindu undivided family. Under Hindu law, the wife of a coparcener is certainly a member of the family. As pointed out in the case of Surjit Lal Chhabda (supra) whatever be the school of Hindu law by which a person is governed, the basic concept of a Hindu undivided family in the sense of who can be its members is just the same. Thus, it is now abundantly clear that in order to constitute a joint family, it is not always necessary that there must be two male members and, therefore, we are unable to agree with the view expressed by the Full Bench of the Patna High Court in CIT v. SHANKAR LAL BUDHIA (supra). In view of the above discussion, we are of the opinion that a coparcener who receives ancestral property at a partition and who subsequently acquires a family, but has no male issues, would hold the property only as the property of a Hindu undivided family.

12. Therefore, in the present case we find that on the marriage of the assessee, his wife became a member of his family with a right to claim maintenance charged on the property held by the assessee which he had obtained earlier under a partition. The family of the assessee, therefore, was a joint family and the property in the hands of the assessee which he got earlier at a partition

is to be considered as property held by the assessee in his capacity as the karta of the Hindu undivided family. Therefore, in our opinion, the share income from M/s. Karshandas Bechardas & Sons was rightly deleted from the total income of the assessee who was assessed in the status of an individual, since the said income is required to be assessed in the hands of H.U.F. of the assessee.

13. We accordingly answer the Reference in the affirmative i.e. in favour of the assessee and against the Revenue.

The Reference accordingly stands disposed of with no order as to costs.

(J.M.Panchal,J.) (M.S.Shah,J.)